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LANDLORD - TENANT
A BREACH OF A RESTRICTIVE COVENANT: DOES AN INTERLOCUTORY INJUNCTION LIE AGAINST A THIRD PARTY IN GOOD FAITH AND WITHOUT KNOWLEDGE?

by Howard KAMINSKY*

Cet article aborde le problème de la violation de l'exclusivité commerciale consentie par un propriétaire à un locataire et examine la question de savoir si la partie ainsi frustrée peut recourir à l'injonction interlocutoire pour faire cesser cette contravention lorsque le tiers impliqué est de bonne foi.

L'auteur procède tout d'abord à un rappel des règles en matière d'injonction pour ensuite exposer puis commenter la controverse jurisprudentielle existant à l'heure actuelle à ce sujet.

This article attempts to examine the scenario of a breach of a restrictive covenant in a landlord-tenant situation, and deal with the question of whether an interlocutory injunction is the oppropriate remedy against a third party in good faith and without knowledge.

In the introduction, the author will give an overview of the concept of injunctive relief in the province of Quebec and then focus on interlocutory injunctions.

In the body of this work, the author will present conflicting jurisprudential opinions to the above mentioned question, and then present a recent decision.

The author concludes by expressing his personal opinion in light of the said recent decision.

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INTRODUCTION

Article 751 of the Civil Code of Procedure of the Province of Quebec (C.C.P.) provides for injunctive relief by way of direct action with or without ancillary conclusions. Article 751 of the said code states:

> «An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties».

Quebec law provides for two types of injunctions. One is the prohibitory or restrictive injunction which directs a person to refrain from doing a specific act or thing. The other is a mandatory or positive injunction whereby a person is ordered to perform some act or operation. Since an injunction is an exceptional remedy, the courts are firm in asserting that entitlement to same must be well established by the applicant. There are three possible stages of injunctive procedures.

The first stage is the provisional stage (art. 753 C.C.P.). If a judge sitting in chambers deems the circumstances precipitating the application to be urgent, the injunction will be granted for a period of ten (10) days.

The second stage is the interlocutory stage. It is granted by motion upon proof by the applicant that such procedure is necessary in order to avoid serious or irreparable injury; or in order to prevent a factual or legal situation of such nature as to render the final judgment ineffectual (art. 752 C.C.P.).

The third stage is the permanent stage. Although relieved of proving urgency, an applicant must still, at this stage, discharge the burden of proof, of entitlement and necessity.

Interlocutory Injunction: Pre-Conditions and Conditions

In this article, we will deal with the second stage, namely, interlocutory injunctions. In order that an application for an interlocutory injunction succeed, article 752 C.C.P. requires that two pre-conditions or tests be satisfied.

Firstly, it is incumbent upon the applicant for such interlocutory relief to establish the appearance of entitlement to same. This would be accomplished by demonstrating, prima facie, to the satisfaction of the court seized with such proceedings, that a judge sitting in final instance might have a reasonable ground for granting a permanent injunction.

Secondly, once the applicant has discharged the obligation of establishing the appearance of entitlement, the said applicant must then fulfill the next criteria of the interlocutory stage which is to satisfy the aforesaid court that such an exceptional procedure is warranted in order to avoid: (i) serious or irreparable injury or, (ii) a factual or legal situation of such nature as to render the final judgment ineffectual.

Once the petitioner has established a right to interlocutory relief as a result of discharging the first two pre-conditions, the courts will then determine whether that right is clear and apparent. This will be accomplished by assessing whether the representation in support of the petition demonstrates that the right is either clear, non-existent or doubtful.

If the applicant is successful in discharging the burden establishing «clear right» to such remedy, then the court should award the interlocutory injunctive relief that was sought.

If the applicant has failed in its proof so severly, that its entitlement to interlocutory injunctive relief appears to be non-existent, then the application should be rejected.

In the event, however, that the judge hearing the interlocutory injunction is doubtful as to the merit of such application, yet is not convinced that the entitlement is non-existent, the balance of convenience and inconvenience should be examined in arriving at a decision.

All of the aforesaid principals, which reappeared for many years in Quebec jurisprudence, were finally elaborated, confirmed and concisely set out by Mr. Justice Owen in the case of *Société de Développement de la Baie James c. Chef Robert Kanatewat*[1], and have ever since, with rare exception, been recognized by our courts as the established method of assessing and applicant's right to interlocutory injunctive relief.

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1. [1975] C.A. 166.

Interlocutory Injunction and Third Parties

This article will deal with the issue of whether an interlocutory injunction may enjoin a third party in good faith without knowledge, who is nevertheless an unwilling participant in a breach by a landlord of a restrictive covenant benefitting the party seeking the injunctive relief.

There is a general consensus in both jurisprudence and doctrine that in cases involving a third party without knowledge in good faith, when a breach is committed, an action in damages initiated by the aggrieved party against the knowledgeable breaching party is certainly appropriate, and can be successful, providing that the action has merits.

The Honourable Mr. Justice Derek Guthrie states, in *Mordzynski v. Devcorp Inc.*, when dealing with Petitioner which is a tenant, Respondent which is a landlord and the «Mis-en-cause» which is a third party in good faith without knowledge:

> «Respondent breached its obligations under Clause 12 of the lease (Exhibit R-2) when it accepted the Mise-en-cause's offer to lease dated February 3, 1989 (Exhibit D-3) and when it signed the lease dated March 2, 1989 (Exhibit D-2) containing a clause that stated the leased premises were to be used "...comme commerce de détail de type dépanneur ou de type coffee shop". For this breach the Petitioner has a recourse in damages against Respondent»[2].

With respect to injunctive relief however, it is not as clear as to whether the entitlement exists against a third party in good faith and without knowledge.

We will now attempt to examine and analyse both positions in light of the most recent jurisprudence, and conclude by formulating the writer's opinion.

THE OPINION THAT FAVOURS THE GRANTING OF INJUNCTIVE RELIEF

The rule of law commonly known as «res inter alios acta» or «privity of contract» is characterized by the fact that the effects of contracts are restricted to the contracting parties. This law is set out in article 1023 of the Civil Code of Lower Canada (C.C.) which states:

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2. J.E. 89-1305 at 3 (Que. S.C.).

> «Contracts have effect only between the contracting parties: they cannot affect third persons, except in the cases provided in the articles of the fifth section of this chapter». (The "said section" is not relevant to the present article.)»

In a relatively recent interpretation of article 1023 C.C., the Honourable Mr. Justice Jean Moisan, in the case of *Damain Inc. v. Place Laval-Roussin Inc.*[3], conveyed, in his ruling, the idea that contracts may have a relative effect upon third parties in good faith and without knowledge of such contract, and Mr. Justice Moisan suppported his said interpretation by drawing from the doctrine relating to the principal of «res inter alios acta» or «privity of contract». The primary thrust for this argument stems from the writings of René Savatier[4], who expounds the theory that contracts in certain instances may have a relative effect on third parties because a party has by contract forfeited its freedom to convey certain rights to third parties. While the judge acknowledges that generally contracts either create or extinguish rights, and that rights have effect only between contracting parties, he nevertheless accepts that there are instances where third parties may be the beneficiary or loser of such rights. Quoting from the work of the said french author René Savatier entitled «Le prétendu principe de l'effet relatif des contrats», Judge Moisan states:

> «L'auteur examine ensuite deux types de contrats créant des obligations entre les parties et pouvant avoir un effet sur les tiers. Il s'agit tout d'abord des contrats translatifs de droits et ensuite, plus généralement, des contrats qui créent ou qui éteignent des obligations. Des premiers, l'auteur écrit:
>
> > Sont également, par définition, opposables aux tiers *les contrats translatifs de droits*. Car les droits qu'ils transfèrent sont nécessairement destinés à s'opposer à des tiers. La cession de créance perdrait tout son sens si elle ne permettait pas au cessionnaire d'agir contre le tiers débiteur. La cession d'un brevet d'invention serait inintelligible si l'acquéreur ne pouvait poursuivre les contrefacteurs; la vente d'un immeuble ne se comprendrait pas si l'acquéreur n'était pas en droit de le revendiquer ou de le défendre contre les tiers»[5].

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3. [1989] 3 R.J.Q. 2846 (Que. S.C.).
4. R. Savatier, «Le prétendu principe de l'effet relatif des contrats», (1934) Revue de droit civil 525.
5. *Supra*, note 3 at 2851.

Mr. Justice Moisan applied the theory of forfeiture of rights to conclude that an interlocutory injunction can be granted against a third party in good faith with no knowledge, and states:

> «Dans ce bail, Place Laval a cédé à Damain un droit d'exclusivité qui fait que, désormais, elle ne peut plus louer un autre local dans son centre d'achats pour des activités de restauration. Jusqu'à ce contrat, elle avait le droit plein, entier et incontestable de louer à n'importe quel autre intéressé un local pour n'importe quelle fin, y compris la restauration. Elle n'a plus ce droit. Elle l'a transporté, abandonné et cédé à Damain. Elle a restreint sa liberté contractuelle d'autant. Elle a fait en sorte que, désormais, Damain est la partie qui peut décider de la présence d'une autre entreprise de restauration dans le centre d'achats. Damain est, par son droit d'exclusivité, propriétaire d'un droit affectant la jouissance de tous les autres locaux du centre.
>
> Il s'agit bien là d'un contrat translatif de droits et, qui de plus est, de droits portant sur la jouissance et l'utilisation de choses»[6].

And further in the judgment, Mr. Justice Moisan adds:

> «Mais Damain a sans aucun doute le droit de recourir à une injonction pour faire cesser par ce tiers la violation d'un droit qui lui appartient»[7].

Other notable authors upon which Mr. Justice Moisan relies to reinforce his argument are Jean-Louis Baudouin and les frères Mazeaud.

THE OPINION THAT FAVOURS THE DISMISSAL OF INJUNCTIVE RELIEF

The position that favours the dismissal of injunctive relief is the narrower and more popular interpretation of article 1023 C.C.

Restrictive Interpretation

The vast preponderance of authors and jurists have embraced the concept that the petition for interlocutory injunction is an exceptional procee-

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6. *Ibid.* at 2852.
7. *Ibid.* at 2853.

ding and as such, the merit of such position must be considered in a most restrictive manner.

A leading example of such unwillingness of jurists to expand the interpretation of article 1023 C.C. is the opinion of the Honourable Mr. Justice Claude Benoit, when he rules in the case of *Restaurant Vichy (Kirkland) Inc. v. Miracle Mile Industrial Park Corp.*:

> «Aucune preuve n'a été faite de mauvaise foi de sa part ou de connaissance de la clause d'exclusivité en faveur de la requérante. Comment le Tribunal pourrait-il prononcer une injonction ayant l'effet de lui interdire d'exploiter un "Rib Cage" quand elle a le droit de le faire aux termes de l'offre de location et que le bail intervenu entre la requérante et l'intimée lui est inopposable. Une personne non nommée peut être tenue de respecter une ordonnance d'injonction dont elle a connaissance mais encore n'est-elle tenue que d'obéir à l'ordonnance adressée à l'intimée»[8].

The said Honourable Justice explains that when there is an absence of proof of bad faith or knowledge on the part of the third party against whom the interlocutory injunction is being sought, he would find it not merely difficult, but rather impossible, to enjoin the said third party from doing what it is lawfully empowered to do.

The Honourable Madam Justice Dionysia Zerbisias, in *Santana Jeans Ltd. v. Adlexco Management Ltd.*, followed and respected the principals examined by Mr. Justice Benoit and placed even less emphasis on knowledge and good and bad faith. The said Madam Justice Zerbisias favoured the opinion that the absence of proof of «lien de droit» either contractual or delictual, between Plaintiff and a third party Defendant, was in itself sufficient ground upon which to dismiss the application for interlocutory injunction. The said Justice states:

> «An order of injunction herein cannot lie against the Mise-en-cause since there is no lien de droit, either contractual or delictual, between it and Plaintiff»[9].

In delving into the principals of article 1023 C.C. it is important to note that the issue of knowledge of third parties as a method of bonding such parties

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8. J.E. 78-841 at 7-8 (Que. S.C.).
9. J.E. 84-121 at 12 (Que. S.C.).

to a contract is treated as an «exception» to the rule of privity of contract. In *107577 Canada Ltée v. Wasser*, Plaintiff-Landlord was attempting to force Defendant-Tenant to vacate the leased premises, claiming that the Defendant breached its lease and was trying to sell beer and wine, which was an exclusive right given to another tenant in the shopping centre. The Honourable Mr. Justice Charles Gonthier studied this matter and made issue of the distinction between real and personal rights, as they affect the principal of privity of contracts. Inherent in real rights is registration and consequently knowledge, either actual or deemed, but with respect to personal rights he states:

> «Le droit à l'exclusivité invoqué par les demandeurs est créé par leur bail et est rattaché à leur qualité de locataires. Il s'agit donc d'un droit personnel créé par contrat qui ne lie pas les tiers en vertu du principe de l'effet relatif des contrats, selon lequel ceux-ci n'ont d'effet qu'entre les parties contractantes (art. 1023 C.C.) (...) L'absence d'obligation contractuelle n'exclut pas cependant la possibilité d'une responsabilité délictuelle si le manquement à une obligation contractuelle constitue également un délit envers un tiers (...) C'est par application de cette dernière notion que la jurisprudence et la doctrine française ont retenu la responsabilité délictuelle du tiers qui connaissent l'existence d'une obligation contractuelle participe avec une partie au contrat à sa violation»[10].

It is interesting to note that Mr. Justice Gonthier stated that while the basis for application of injunctive relief against a third party necessitates the element of knowledge, he couples that with the notion that the activities of a third party must be tantamount to a delict, and thus introduces the element of «good faith».

This notion was further dealt with by the Supreme Court of Canada when it enjoined a third party to a contract to respect certain conditions of that contract, but was quite clear and definite in establishing that such third parties did have a «lien de droit» due to the fact that they had committed a delict, and that such commission was made possible because such third parties did have knowledge of the contract. In this case, *Trudel v. Clairol Inc. of Canada*, the Supreme Court ruled that the third party not only knew of the restrictive covenant and participated in its breach, but was in fact instrumental in inducing a party to the contract to breach such contract. In the said case Mr. Justice Martland states:

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10. (29 March 1985) Montreal 500-05-007768-839 (Que. S.C.).

> «Appellant, by inducing party to a breach of the contract between respondent and each of its agents, committed a delict for which he is liable, because it is an act of dishonesty to be associated knowingly with a breach of contract»[11].

Ineffectiveness

The courts have also treated the very particular problem of ineffectiveness of such an exceptional proceeding against a third party. If the courts choose to grant an interlocutory injunction, parties will be placed in situations that require that they do, or cease to do things which extend beyond their legal powers. Such situations place these parties immediately in «contempt of court» with no possible remedy, obviously an unsatisfactory and counter productive solution. In discussing these situations, Mr. Justice Benoit in *Restaurant Vichy (Kirkland) Inc. v. Miracle Mile Industrial Park Corp.* states:

> «Quant aux conclusions recherchées contre l'intimé locateur, la Cour pourrait-elle les accorder, à supposer que les conditions attachées au recours de l'injonction soient remplies? Oui, si l'intimé peut légalement faire ce que la Cour lui ordonnerait de faire. Mais, dans la présente affaire, le locateur a loué un local et en a livré possession au nouveau locataire. Que peut faire le locateur pour empêcher le nouveau locataire d'occuper les lieux et d'y exploiter un «Rib Cage»? Il est impensable de lui permettre de recourir à la force physique. Si le nouveau locataire a droit de continuer l'exploitation du local loué et si le locateur ne peut légalement faire cesser l'exploitation, prononcer en pareilles circonstances une ordonnance d'injonction contre le locateur équivaudrait à prononcer une ordonnance à laquelle serait attachée une condamnation certaine pour outrage au Tribunal, puisque l'on saurait d'avance que l'intimé n'est pas en mesure de se conformer à l'ordonnance. Et le but premier recherché par la requérante ne serait pas atteint, savoir la fermeture du local: la requête en injonction n'est donc pas appropriée»[12].

Madam Justice Zerbisias also dealt with the issue of ineffectiveness of interlocutory proceedings, which would leave a party condemned for contempt of court, and unable to reverse such situation:

> «Moreover, to so issue an injunction herein against the Defendants under these circumstances would, if unopposable to the Mise-en-

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11. [1975] 2 S.C.R. 236 at 237.
12. *Supra*, note 8 at 8-9.

> cause, effectively result in the eventual condemnation of the Defendants to a judgment of contempt against them.
>
> Moreover, in the present case, to issue an injunction at the interlocutory stage, and to permit the Plaintiff to take possession of the premises presently occupied by the Mise-en-cause, under an allegedly valid lease, would create a state of facts which could not be undone by the final judgment. Therefore an injunction will not lie at the present stage for all conclusions sought by Plaintiff»[13].

IN-DEPTH STUDY

In *Mercerie Bougrine Inc. v. Les Galeries des Monts Inc. and Vêtements Le Vieux Canot Inc.*[14], the Honourable Madam Justice Marie Deschamps was presented with both arguments in deciding whether, at the interlocutory stage, to enjoin a third party in good faith and without knowledge of a contentious restrictive covenant. The said judge did not share the opinion of Mr. Justice Moisan and concluded that the interlocutory judgment should not prevail. Commenting on the judgment *Damain v. Place Laval-Roussin*[15], Madam Justice Deschamps states:

> «Dans cette affaire l'Honorable Jean Moisan a procédé à une étude approfondie de la jurisprudence qui prévaut, mais l'a écartée en invoquant une distinction entre l'effet des contrats et leur possible opposabilité aux tiers. Avec déférence, la soussignée ne croit pas que cette distinction justifie de s'écarter de la règle énoncée à l'article 1023 C.C.»[16].

In arriving at this conclusion, Madam Justice Deschamps analyzed some of the doctrine upon which Mr. Justice Moisan relied in support of his decisions.

When commenting on the following extract from professor Jean-Louis Baudouin which Mr. Justice Moisan quotes to wit:

> «382-*Opposabilité des contrats* - Dans l'appréciation de la portée de l'effet relatif des contrats, il ne faut pas confondre deux notions voisines et parfois difficiles à bien distinguer: l'effet de l'obligation et son opposabilité. Si l'obligation contractuelle est sans effet vis-à-vis

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13. *Supra*, note 9 at 13-14.
14. (14 November 1990) Montreal 500-05-011970-900 (Que. S.C.). Defendants were represented by the author.
15. *Supra*, note 3.
16. *Ibid.* at 6.

> des tiers, en ce sens qu'ils ne peuvent en devenir créancier ou débiteur, il n'en reste pas moins qu'elle leur est opposable. Le fait qu'un tiers ne soit pas partie à un contrat ne lui donne pas le droit d'ignorer celui-ci. Ce contrat lui est en effet opposable comme tout fait juridique. Ainsi, l'employeur qui, en connaissance de cause, engage un individu qu'il sait lié à son concurrent, commet une faute délictuelle et peut être poursuivi en dommages. Le principe de l'effet relatif des contrats doit donc être réduit à sa vraie dimension qui est la suivante: le tiers n'a aucun droit de créance, ni aucune responsabilité obligationnelle en raison d'une convention à laquelle il n'est pas partie. Il demeure toutefois tenu de respecter celle-ci»[17].

Madam Justice Deschamps states:

> «Le professeur Baudouin n'émet donc pas un nouveau principe, mais ne fait que reprendre ceux qui ont été appliqués par le Juge Benoit ainsi que par le Juge Gonthier.
>
> D'ailleurs le professeur Baudouin s'appuyait pour émettre son opinion sur l'affaire *Trudel v. Clairol Inc. of Canada*, affaire, comme on l'a vu plus haut, dans laquelle la Cour Suprême s'est fondée sur la connaissance par le défendeur des droits de la demanderesse»[18].

When we read the foregoing quote, it is apparent that the element of knowledge is essential to the conclusion that a fault was committed. It seems clear that if one has an obligation to respect legal circumstances, one must first have knowledge of such circumstances. The same conclusion was drawn by Madam Justice Deschamps in *Mercerie Bougrine Inc. v. Les Galeries des Monts Inc. and Vêtements Le Vieux Canot Inc.*[19], when she states in fact that professor Baudouin did not stray from the established law and doctrine but in fact maintained the principal that; prior knowledge of a breach of contract on the part of the party against whom injunctive relief is sought is essential to the granting of the injunction against such party. Madam Justice Deschamps acknowledges that professor Baudouin based his conclusion on a judgment (previously cited in this article) from the Supreme Court of Canada entitled *Trudel v. Clairol Inc. of Canada*[20].

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17. J.-L. Baudouin, *Les obligations*, 3e éd., Cowansville, Qué., Yvon Blais, 1989, no. 382.
18. *Supra*, note 14 at 7.
19. *Supra*, note 14.
20. *Supra*, note 11.

Madam Justice Deschamps also comments on an extract of a passage from les frères Mazeaud cited by Mr. Justice Moisan. In direct dissension with Mr. Justice Moisan, Madam Justice Deschamps uses this quote to support *her* ruling that a contractual obligation between certain parties cannot be invoked to enjoin a third party in good faith without knowledge of such contractual obligation:

> «L'affaire Damain prend également appui sur un passage des frères Mazeaud. Il est intéressant de noter que la section portant sur le principe que l'affaire Damain voudrait faire reconnaître est la suivante:
>
> > 761. Les tiers n'ont pas le droit de méconnaître l'existence des obligations. - L'obligation est un fait que les tiers n'ont pas le droit de méconnaître.
> >
> > Une abondante jurisprudence, notamment en matière de contrat de travail, affirme la responsabilité d'un tiers qui, ***sciemment***, se rend complice de la violation d'un contrat, et le condamne in solidum avec le débiteur»[21]. (Les soulignés sont de la soussignée).

It is clear from the way Madam Justice Deschamps underlines the word «sciemment» that this is the operative word in her quote. It demonstrates that bad faith is the essential element required when granting an interlocutory injunction against a third party, and consequently when that third party is in good faith, the interlocutory injunction should not be granted.

When we focus upon the case law and doctrine quoted by Mr. Justice Moisan, it becomes apparent that Mr. Justice Moisan has misinterpreted the opinions expounded by the Justices and authorities that he quotes. In fact they all expressed the opposite opinion to the one expounded by Mr. Justice Moisan. Madam Justice Deschamps clearly took this position when, in assessing the judgment of Judge Moisan, she said:

> «On peut donc constater que ni les frères Mazeaud, ni le professeur Baudouin, ni la Cour Suprême ne reconnaissent qu'une obligation peut être opposable à un tiers si celui-ci n'a même pas connaissance de cette obligation»[22].

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21. *Supra*, note 14 at 8.
22. *Ibid.*

Commenting on Mr. Justice Moisan's theory (previously discussed), that by contract the holder has forfeited his freedom to exercise a right, all the examples cited from Mr. Justice Moisan that were extracted from the work of René Savatier[23] entailed the use of the registration system used in the Province of Quebec, or the federal laws on intellectual property. It is important that such systems and laws have the effect of attributing «knowledge» whether apparent or deemed. Madam Justice Deschamps, commenting on the various theories of assignment of rights, draws comparisons between deemed or real knowledge, and lack of same:

> «Si on se réfère à la citation du Juge Gonthier dans l'affaire *107577 Canada Ltée v. Wasser*, on se rappellera que le droit à l'exclusivité est un droit personnel, comme d'ailleurs tout droit découlant d'un bail. Il ne s'agit pas d'un droit réel qui pourrait "être opposé" au tiers par simple cession. Le Code Civil prévoit spécifiquement un cas de cession de droit personnel: la cession de créance. Le Code dicte comment la cession peut être rendue opposable au tiers. Pour que le tiers soit affecté par cette cession, il faut la publiciser par la signification et la délivrance. On ne peut pallier à la cession et délivrance que par l'acceptation.
>
> En conséquence, même si on appliquait les règles de la cession de droit personnel la nécessité de la publicité demeurerait présente»[24].

CONCLUSION

In determining whether an interlocutory injunction lies against a third party to whom a landlord has leased premises in violation of a restrictive covenant in force between the common landlord and another tenant, the conduct of the third party should be assessed. If the third party is revealed to have been in bad faith with knowledge of the restrictive covenant which was breached, an injunction should be granted against such third party. To the contrary, as concluded by Madam Justice Deschamps, if the said third party is in good faith without knowledge, no injunction lies. It is also the opinion of Madam Justice Deschamps that Quebec jurisprudence has evolved to the point where mere knowledge on the part of a third party of a restrictive covenant binding a landlord would give rise to delictual liability, *if* the third party were involved with the landlord in breaching such restrictive covenant and therefore, such third party may be enjoined:

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23. *Supra*, note 4.
24. *Supra*, note 14 at 9-10.

> «L'application des règles de la responsabilité délictuelle rend le fardeau des parties moins lourd, mais exige quand même la connaissance par le tiers des droits des parties. Il serait impensable de pouvoir opposer à un tier non partie à un contrat, des droits dont il ignore tout. L'évolution jurisprudentielle est telle maintenant que la simple connaissance suffit par opposition à une participation à un contrat, mais cette évolution jurisprudentielle ne permet pas une contravention claire à la règle de la relativité des contrats»[25].

This writer is in agreement with the opinion of Madam Justice Deschamps when she incorporates the words of the frères Mazeaud (notably the word «sciemment») and concludes that bad faith is the essential element required when granting an interlocutory injunction against a third party and consequently when that third party is in good faith, the interlocutory injunction should not be granted. Mere knowledge is not sufficient to conclude that delict has been committed. In order to conclude that a delict has been committed by a third party, one must, in addition to establishing knowledge, evaluate the good and/or bad faith of the said third party. By way of example we may turn to *Mercerie Bougrine Inc. v. Les Galeries des Monts Inc. and Vêtements Le Vieux Canot Inc.*[26]. In this case, the third party (Vêtements Le Vieux Canot Inc.) in good faith without knowledge leased premises from the landlord of a shopping centre, namely Les Galeries des Monts Inc., to operate a retail outlet identified as a «Ralph Lauren style country store». This style of retail operation is a relatively new concept to Quebec; it may be described as a «general country store», having a wide range of products dominated by clothing, but including everything from leather luggage to pot pourri, giftware and bath items. Mercerie Bougrine Inc. had been granted, by said landlord, by way of restrictive covenant, an exclusivity to operate a mens haberdashery or «mercerie pour hommes» in the said shopping centre. In this case, both the landlord and the third party were in good faith because in their judgment, the Ralph Lauren style country store did not violate Mercerie Bougrine Inc.'s restrictive covenant. Madam Justice Deschamps appropriately did not rule as to whether the lease between the landlord and a third party, tenant, violated the restrictive covenant at issue, because the third party was without knowledge of such restrictive covenant. Even if there was knowledge on the part of the third party, but if the third party was credible and satisfied the court that it believed it was not violating the exclusivity granted to Mercerie Bougrine Inc., notwithstanding allegations to the contrary, by the applicant for interlocutory injunction, the application for the interlocutory injunction should not be granted. What would have happened in

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25. *Ibid.* at 10.
26. *Supra*, note 14.

the event that it was proven that the third party had knowledge of the restrictive covenant between the landlord and Mercerie Bougrine Inc.? If we were to adhere to the opinion of Madam Justice Deschamps, an interlocutory injunction would lie only in the event that the conduct of the third party was established to be tantamount to a delict.